

# *Fraternal Order of Police, Colorado Lodge # 19 v. City of Commerce City\**

## I. INTRODUCTION

Municipal governments can gain significant benefits by using alternative dispute resolution (ADR) procedures to resolve its contractual disputes.<sup>1</sup> “It ‘makes good business’ sense” for private entities to use ADR clauses in their contracts, and “[t]his statement is no less applicable to a municipality’s contractual relations.”<sup>2</sup> The benefits include “potential savings in time and money, less adversarial entrenchment, broader possibilities in outcome, increased control by the parties . . . and long-term relationship enhancement.”<sup>3</sup> Indeed, municipal governments can utilize ADR procedures to help “eliminate bureaucratic detachment and ‘us versus them’ perceptions” while promoting “maximum accessibility and responsiveness.”<sup>4</sup>

When implementing ADR procedures, a municipality must be cognizant of the constraints on its power to delegate governmental authority, a consideration not present in a private entity’s decision to employ alternative dispute resolution.<sup>5</sup> For example, binding arbitration, a method of ADR frequently used by municipal governments to resolve public sector labor disputes, “involves the vesting of power in an independent third party to decide what some of the terms and conditions of public employment will be or how contracts will be construed.”<sup>6</sup> Such systems come under attack as “unlawful delegation[s] of the state legislature’s authority.”<sup>7</sup> The argument derives from the general rule requiring that the third party be “politically accountable” and that the vesting of power be accompanied by standards and

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\* 996 P.2d 133 (Colo. 2000).

<sup>1</sup> See Michael K. Travers, *ADR: Important Options For Municipal Government*, 24 COLO. LAW. 1245, 1279 (1995).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> “The general rule has been that legislative delegations of power involving the exercise of judgment and discretion may not be made to persons or boards or commissions unless the delegation has been expressly authorized by legislation.” W. Paul Eckman, *Delegation of Authority in Land Use Decisions*, COLO. LAW., Jan. 1997, at 73.

<sup>6</sup> James E. Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law: Lessons From Cases That Have Perpetuated an Anachronism*, 30 ST. LOUIS U. L.J. 331, 334 (1986).

<sup>7</sup> Louis S. Cataland, Note, *Binding Arbitration and The Nondelegation Doctrine: Does Ohio’s Collective Bargaining Act Unconstitutionally Delegate Legislative Authority to Administratively Appointed Arbitrators?*, 6 OHIO ST. J. ON DISP. RESOL. 83, 87 (1990).

safeguards "so as to avoid arbitrary decision-making and afford meaningful judicial review."<sup>8</sup>

Colorado's constitution contains a prohibition against delegating legislative power.<sup>9</sup> The Supreme Court of Colorado granted certiorari in *Fraternal Order of Police, Colorado Lodge # 19 v. City of Commerce City* to determine whether an amendment to the city charter of Commerce City, creating a system of collective bargaining and binding arbitration between police officers and the city, was an unlawful delegation of legislative power in violation of the Colorado Constitution.<sup>10</sup>

## II. FACTS AND PROCEDURAL HISTORY OF THE CASE

In 1998, Commerce City voters approved an amendment to the city charter creating a system of collective bargaining between police and the City on matters including wages, hours, and benefits.<sup>11</sup> If contract negotiations failed, the amendment included a provision for binding arbitration on "'any and all' unresolved issues."<sup>12</sup> The amendment required the City to take applications of potential arbitrators from which the city council would select at least three to compose a permanent panel of arbitrators.<sup>13</sup> The system permitted the City Council to add or remove arbitrators from the panel at any time, except that arbitrators could not be removed while hearing a case.<sup>14</sup> If the parties reached an impasse in negotiations,<sup>15</sup> they were to select an arbitrator from the panel to hear the

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<sup>8</sup> Eckman, *supra* note 5 at 73.

<sup>9</sup> Article XXI, Section 4 provides the following:

Every person having authority to exercise or exercising any public or governmental duty, power, or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provisions of this constitution.

COLO. CONST. art. XXI, § 4.

<sup>10</sup> *Fraternal Order of Police, Colo. Lodge # 19 v. City of Commerce City*, 996 P.2d 133, 134 (Colo. 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* "The charter amendment specifie[d] the qualifications and experience necessary to be eligible for the permanent panel of arbitrators . . . ." *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

dispute either by agreement or by engaging in an “alternating ‘strike process.’”<sup>16</sup> After considering seven factors<sup>17</sup> enumerated by the amendment, the arbitrator was “required to choose either the final offer of the City or the final offer of the [police union] on each issue in dispute.”<sup>18</sup>

Commerce City filed a complaint in the Adams County District Court seeking a “declaratory judgment on the validity of the binding arbitration provisions and an injunction enjoining implementation of the arbitration provisions.”<sup>19</sup> On cross-motions for summary judgment, the district court ruled that the charter amendment’s binding arbitration provisions “violated the Colorado Constitution and were therefore void and unenforceable.”<sup>20</sup> The parties appealed but before judgment was reached in the court of appeals, the Supreme Court of Colorado granted certiorari<sup>21</sup> to determine whether the

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The charter amendment require[d] the parties to begin the collective bargaining process on or before May 15 of any year in which the bargaining agreement expires. In the event that the employee organization and the City [were] unable to reach an agreement on a contract within thirty days of their first meeting, the charter amendment require[d] . . . [the parties] to . . . submit[] to binding arbitration.

*Id.*

<sup>16</sup> *Id.* The “strike process” allows each party to alternatively eliminate “one name from the list of members of the permanent panel of arbitrators until either one or two names remain. If one name remains, that person becomes the arbitrator for the dispute. If two names remain, the Mayor selects one of those remaining two persons to be the arbitrator.” *Id.*

<sup>17</sup> The amendment required the arbitrator to consider the following factors before rendering a decision:

(1) [T]he interests and welfare of the public and the financial ability of the City to bear the costs involved; (2) the lawful authority of the City; (3) stipulations of the parties; (4) comparison of the compensation, benefits, hours and other terms or conditions of employment of the members of the police department involved with other police department members performing similar services in public employment in comparable communities; (5) the cost of living; (6) any claims of failure of a party to bargain in good faith pursuant to section 21.7(c); and (7) other similar standards recognized in the resolution of interest disputes.

*Id.* at 135 n.5.

<sup>18</sup> *Id.* at 134.

<sup>19</sup> *Id.* at 135.

<sup>20</sup> *Id.*

<sup>21</sup> The Colorado Supreme Court granted certiorari pursuant to Colorado Appellate Rule 50. *Id.* at 133. The Rule provides the following:

A writ of certiorari from the Supreme Court to review a case newly filed or pending in the court of appeals, before judgment is given in said court, may be granted upon a showing . . . [t]hat the case is of such imperative public importance as to justify the

charter amendment could withstand the Colorado Constitution's prohibition against delegating legislative power.<sup>22</sup>

### III. DECISION OF THE SUPREME COURT OF COLORADO

The Supreme Court of Colorado held the binding arbitration system created by the amendment to the city charter of Commerce City was "constitutional because it provides the arbitrator with the political accountability required" by the Colorado Constitution.<sup>23</sup> The court rejected the City's argument that the amendment was unconstitutional because it "delegate[s] the authority to set the terms and conditions of municipal employment to an arbitrator who is not sufficiently accountable to an elective official."<sup>24</sup> In reaching its decision, the court examined the prohibition against delegating legislative power found in Article XXI, Section 4 of the Colorado Constitution, and set out a framework, created by its prior decisions, for analyzing binding arbitration provisions under this section.<sup>25</sup> The required analysis consists of determining the existence of sufficient "political accountability in compliance with [A]rticle XXI, [S]ection 4," and "sufficient standards and safeguards for the arbitrator's exercise of discretionary power."<sup>26</sup> The court concluded by evaluating the city charter amendment within this framework<sup>27</sup>

#### A. "Political Accountability"

The Supreme Court of Colorado read the plain language of Article XXI, Section 4 of the Colorado Constitution to require that "every person having authority to exercise a governmental power must either be an elective officer or be appointed or designated in accordance with law by an elective officer."<sup>28</sup> That is, the section creates a prohibition against delegating

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deviation from normal appellate processes and to require immediate determination in the Supreme Court.

COLO. REV. STAT. ANN. APP. R. 50 (West 2000).

<sup>22</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 134-35.

<sup>23</sup> *Id.* at 135.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 135-37.

<sup>26</sup> *Id.* at 139.

<sup>27</sup> *Id.* at 137-39.

<sup>28</sup> *Id.* at 135.

“legislative power to politically unaccountable persons.”<sup>29</sup> The court proceeded to review the following decisions interpreting this prohibition. The cases indicate that binding arbitration will comply with Colorado law only if the arbitrator is politically accountable to an elective official.

The court cited *Greeley Police Union v. City Council of Greeley*,<sup>30</sup> as its first interpretation of the nondelegation doctrine in the context of binding arbitration of public labor disputes.<sup>31</sup> In *Greeley*, the police union challenged the validity of an amendment to the Greeley City Charter establishing a system of collective bargaining that required “[a]ll matters incapable of being resolved by negotiation . . . to be submitted to an arbitrator whose ruling [was] binding on both the city and the union.”<sup>32</sup> The American Arbitration Association, a private organization, selected the arbitrator.<sup>33</sup> The *Greeley* court reasoned that a fundamental precept of representative government is that “officials engaged in governmental decision-making (e.g., setting budgets, salaries, and other terms and conditions of public employment) must be accountable to the citizens they represent.”<sup>34</sup> The court concluded that delegating these decisions to a private organization “[with] no accountability to the public” violated the Colorado Constitution.<sup>35</sup>

One year later in *City of Aurora v. Aurora Firefighters’ Protective Association*,<sup>36</sup> the *Greeley* rule was reaffirmed.<sup>37</sup> In *Aurora Firefighters*, the Aurora City Charter provided for binding arbitration when contract negotiations between the City and the Aurora Fire Department failed.<sup>38</sup> As in *Greeley*, the “fatal flaw” was that “the organization charged with creating the list of potential arbitrators and making the final selection of the arbitrator had no political accountability.”<sup>39</sup> The court followed the *Greeley* rule and held

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<sup>29</sup> *Id.* at 136 (citing *Greeley Police Union v. City Council of Greeley*, 553 P.2d 790, 792 (Colo. 1976)).

<sup>30</sup> *Greeley Police Union v. City Council of Greeley*, 553 P.2d 790, 790 (Colo. 1976).

<sup>31</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 135.

<sup>32</sup> *Greeley*, 553 P.2d at 791.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 792.

<sup>35</sup> *Id.*

<sup>36</sup> *City of Aurora v. Aurora Firefighters’ Protective Ass’n*, 566 P.2d 1356, 1357 (Colo. 1977).

<sup>37</sup> *Fraternal Order of Police, Colo. Lodge # 19 v. City of Commerce City*, 996 P.2d 133, 136 (Colo. 2000).

<sup>38</sup> *Aurora Firefighters*, 566 P.2d at 1357.

<sup>39</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 136.

the binding arbitration provision to be an “unconstitutional delegation of [legislative] authority.”<sup>40</sup>

The court next reviewed its decision in *City & County of Denver v. Denver Firefighters Local No. 858*.<sup>41</sup> Denver’s Home Rule Charter provided a grievance procedure whereby “an aggrieved firefighter,” dissatisfied with the disposition of his complaint under prior proceedings, could submit to binding arbitration for final resolution of the matter.<sup>42</sup> The procedure required a “‘Grievance Arbitration Board’ consisting of an appointee of the City, an appointee of the Union, and a third appointee jointly selected by the ‘representatives of each party’” to consider the complaint and apply existing contract provisions to resolve the complaint.<sup>43</sup> The court recognized a distinction between binding interest arbitration and binding grievance arbitration.<sup>44</sup> While binding interest arbitration permits the arbitrator to set “the terms and conditions of public employment,” a function “the electorate has entrusted to its elected representatives,” binding grievance arbitration confines the arbitrator “to interpretation and application” of an existing agreement, a judicial function.<sup>45</sup> The distinction was dispositive because “[t]he authority to interpret an existing contract . . . does not constitute legislative authority, and the nondelegation principle is not implicated in grievance arbitration.”<sup>46</sup> As a result, Denver’s Home Rule Charter, which created a system of binding grievance arbitration, did not run afoul of the Colorado Constitution’s prohibition against delegating legislative authority to “unaccountable agencies or persons.”<sup>47</sup> Thus, the Grievance Arbitration Board was not required to be politically accountable because political accountability is only necessary in binding *interest* arbitration.<sup>48</sup>

Finally, the court recounted its 1992 decision in *Regional Transportation District v. Colorado Department of Labor and Employment* where it further developed the requirement of political accountability.<sup>49</sup> In *Regional Transportation District*, the court considered a provision of The Colorado

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<sup>40</sup> *Aurora Firefighters*, 566 P.2d at 1357.

<sup>41</sup> *City & County of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1032 (Colo. 1983).

<sup>42</sup> *Denver Firefighters*, 663 P.2d at 1034–35.

<sup>43</sup> *Id.* at 1035.

<sup>44</sup> *Id.* at 1037–38.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1038.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Reg’l Transp. Dist. v. Colo. Dep’t of Labor and Employment*, 830 P.2d 942, 942 (Colo. 1992).

Labor Peace Act<sup>50</sup> which “govern[ed] mediation and arbitration between an authority, such as [Regional Transportation District], and its employees.”<sup>51</sup> In particular, the court evaluated a provision permitting “the Director [of the Colorado Department of Labor and Employment] to order arbitration” under certain circumstances.<sup>52</sup> In order for this delegation of power to be constitutionally permissible, the Director needed to be politically accountable.<sup>53</sup> The supreme court reasoned as follows:

The arbitrator was appointed by the Director. The Director is appointed by the Executive Director of the Department of Labor . . . who is appointed by the Governor, with the consent of the senate, and serves at the pleasure of the Governor. . . . The Governor holds an elective office . . . and is subject to recall under the Colorado Constitution, article XXI, section 4.<sup>54</sup>

This hierarchy provided sufficient political accountability and was upheld by the supreme court.<sup>55</sup> The case is distinguishable from *Greeley* and *Aurora Firefighters* because “[i]n both of those cases, the original list of potential arbitrators was submitted by the [American Arbitration Association] and the final selection of the arbitrator(s) was made by the [American Arbitration Association] after a striking process. In contrast . . . the ‘selection of the arbitrator [here] is by a politically accountable government official . . . .’”<sup>56</sup>

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<sup>50</sup> COLO. REV. STAT. ANN. § 8-3 (West 2000).

<sup>51</sup> *Reg'l Transp. Dist.*, 830 P.2d at 944.

<sup>52</sup> *Id.* at 947. The Labor Peace Act provides, in pertinent part, as follows:

Where the exercise of the right to strike is desired by the employees of any authority, the employees or their representative shall file with the division written notice of intent to strike not less than forty calendar days prior to the date contemplated for such strike. Within twenty days of the filing of the notice, the director shall enter an order allowing or denying the strike based on the grounds of whether or not such strike would interfere with the preservation of the public peace, health, and safety in accordance with the rules and regulations of the division. Any order denying a strike under this section shall include an order to arbitrate in accordance with section 8-3-112.

COLO. REV. STAT. ANN. § 8-3-113(3) (West 2000).

<sup>53</sup> *Reg'l Transp. Dist.*, 830 P.2d at 947.

<sup>54</sup> *Id.* at 947-48.

<sup>55</sup> *Id.* at 947.

<sup>56</sup> *Fraternal Order of Police, Colo. Lodge # 19 v. City of Commerce City*, 996 P.2d 133, 137 (Colo. 2000).

## B. "Standards and Safeguards"

The supreme court recognized that a delegation of legislative authority to a politically accountable person, in compliance with Article XXI, Section 4 of the Colorado Constitution, must nevertheless "'contain sufficient standards and safeguards' to protect against 'unnecessary and uncontrolled exercise of discretionary power.'"<sup>57</sup> The court articulated this "test for determining whether a delegation of legislative power is too broad"<sup>58</sup> in *Cottrell v. City & County of Denver*.<sup>59</sup> The delegation of legislative power at issue in *Cottrell* was contained in a provision of an amendment to the Denver City charter that gave the Denver Board of Water Commissioners authority to set water rates.<sup>60</sup> The court stated that the "guiding consideration is whether [the standards and safeguards] are sufficient to insure that [the] action will be rational and consistent in the first instance and that subsequent judicial review of that action is available and will be effective."<sup>61</sup> The amendment to Denver's city charter limited the Board's discretion to set water rates by requiring, among other things, that rates be set "'as low as good service will permit,'" and that "all board meetings be open to the public."<sup>62</sup> The supreme court found that these provisions provided standards and safeguards sufficient to protect against abuse.<sup>63</sup> Therefore, a system of binding arbitration of public labor disputes is required to contain similar standards that prevent arbitrary action taken by the arbitrator, and "safeguards in the form of judicial review of the arbitrator's decision."<sup>64</sup>

## C. The Supreme Court's Analysis of the Commerce City Charter Amendment

After reviewing the relevant provisions of Colorado law, the Colorado Supreme Court turned to the arbitration system created by the amendment to

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<sup>57</sup> *Id.* at 138 (citing *Reg'l Transp. Dist. v. Colo. Dep't of Labor and Employment*, 830 P.2d 942, 948-49 (Colo. 1992)).

<sup>58</sup> *Reg'l Transp. Dist.*, 830 P.2d at 948.

<sup>59</sup> *Cottrell v. City & County of Denver*, 636 P.2d 703 (Colo. 1981).

<sup>60</sup> *Id.* at 704.

<sup>61</sup> *Id.* at 709.

<sup>62</sup> *Id.* at 710.

<sup>63</sup> *Id.*

<sup>64</sup> *Fraternal Order of Police, Colo. Lodge # 19 v. City of Commerce City*, 996 P.2d 133, 138-39 (Colo. 2000).



the city charter of Commerce City.<sup>65</sup> As a system of binding *interest* arbitration, the nondelegation principle applied.<sup>66</sup> Thus, the court first considered whether the system provided for the selection of a politically accountable arbitrator in compliance with Article XXI, Section 4 of the Colorado Constitution.<sup>67</sup> Next, it considered whether the system contained adequate standards and safeguards to check the arbitrator's exercise of discretionary power.<sup>68</sup>

*1. The Charter Amendment Provides for Politically Accountable Arbitrators*

As noted above, the City's principal argument was that an arbitrator under the charter amendment was "not sufficiently accountable to an elective official."<sup>69</sup> However, in rejecting this argument, the court recognized a "key distinction" between this case and prior cases in which the necessary political accountability was lacking.<sup>70</sup> In *Greeley and Aurora Firefighters*, the American Arbitration Association, "an independent organization, ultimately selected the arbitrators with no political accountability."<sup>71</sup> Thus, the arbitration systems in those cases "resulted in the selection of an arbitrator with no connection to any elected officials and consequently, a complete lack of political accountability."<sup>72</sup> By contrast, the amendment to the city charter of Commerce City "requir[ed] the City Council to create the permanent panel of arbitrators, and . . . allow[ed] the City Council to remove persons from the arbitration panel at any time other than while actively hearing a case . . ."<sup>73</sup> The supreme court considered this ability of the City Council to exercise continuing control over the arbitrators in providing the political accountability necessary to comply with Colorado law.<sup>74</sup> Moreover, the court concluded that "the plain mandates of [A]rticle XXI, [S]ection 4 are met" inasmuch as the "arbitrator is designated (appointed by the City Council and

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<sup>65</sup> *Id.* at 137.

<sup>66</sup> *City & County of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1038 (Colo. 1983).

<sup>67</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 137.

<sup>68</sup> *Id.* at 138.

<sup>69</sup> *Id.* at 135.

<sup>70</sup> *Id.* at 138.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 137.

<sup>74</sup> *Id.* at 138.

then selected through the [alternating strike process]) in accordance with law (the Charter of the City of Commerce City) by elective officers (the City Council).’’<sup>75</sup>

## 2. *The Charter Amendment Contains Sufficient Standards and Safeguards*

As noted in *Regional Transportation District*, an arbitration system must contain “sufficient standards and safeguards . . . to protect against [arbitrary] exercise of discretionary power.”<sup>76</sup> Accordingly, the supreme court considered whether the amendment to the city charter of Commerce City contained the standards and safeguards necessary to control the arbitrator’s exercise of discretionary power.<sup>77</sup>

The charter amendment required an arbitrator to consider seven factors before it rendered any decision.<sup>78</sup> Furthermore, it permitted limited judicial review of an arbitrator’s decision.<sup>79</sup> The court concluded that “[b]y requiring the arbitrator to consider this comprehensive list of factors,” and by including the provision for judicial review, the charter amendment provides the necessary “standards and safeguards for the arbitrator’s exercise of discretionary power.”<sup>80</sup>

Finding the charter amendment to contain the necessary element of political accountability, and sufficient standards and safeguards, the Supreme Court of Colorado reversed the district court’s order and remanded the case for entry of summary judgment in favor of the police union.<sup>81</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Reg’l Transp. Dist. v. Colo. Dep’t of Labor and Employment*, 830 P.2d 942, 948–49 (Colo. 1992).

<sup>77</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 138.

<sup>78</sup> *Id.* at 138. *See supra* note 17.

<sup>79</sup> *Fraternal Order of Police, Colo. Lodge # 19*, 996 P.2d at 139. The charter amendment limited judicial review to consideration of three factors:

(1) [W]hether the award was procured by corruption, fraud, or other undue means; (2) whether the decision on any issue is arbitrary and capricious, i.e., there is no competent evidence in the record to support the decision; or (3) whether the decision on any issue was reached without considering the factors listed above.

*Id.*

<sup>80</sup> *Id.* at 139.

<sup>81</sup> *Id.*

#### IV. CONCLUSION

Following the Colorado Supreme Court's decision in *Fraternal Order of Police*, municipal governments may continue to employ arbitration as a means of resolving collective bargaining disputes with public employee organizations. Provided that constitutional requirements are met, municipalities need not forfeit the unique benefits of alternative dispute resolution in the public sector.<sup>82</sup> Indeed, delegations of legislative power, such as that which occurs in binding interest arbitration, may provide a means for municipalities to promote efficient government.<sup>83</sup>

As one commentator notes, "two basic principles" are derived from the decisions of the Colorado Supreme Court interpreting the nondelegation doctrine.<sup>84</sup> First, delegations of legislative power "must include sufficient standards [and safeguards] to fetter the discretion of the delegee so as to avoid arbitrary decision-making and to afford meaningful judicial review."<sup>85</sup> Second, "the delegation must be to a 'politically accountable' delegee."<sup>86</sup> The Colorado Supreme Court's decision in *Fraternal Order of Police*, indicates that binding interest arbitration of public labor disputes will be upheld in Colorado if it conforms to these principles.

*Anthony Modd*

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<sup>82</sup> See Travers, *supra* note 1, at 1279.

<sup>83</sup> See Eckman, *supra* note 5, at 73.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

